

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BENIHANA OF TOKYO

Case No. 9-CA-34622

and

EMMANUEL BUCAYU, AN INDIVIDUAL

Linda B. Finch, Esq.,
for the General Counsel.
Richard L. Mann, Esq.,
(*Richman, Lawrence, Mann, Greene,*
Chizever, Friedman & Phillips),
of Beverly Hills, California,
for the Respondent.
Jonathan C. Hardy, Esq.,
of Louisville, Kentucky,
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky on August 21 and 22, 1997. The charge was filed February 10, 1997 and the complaint was issued April 23, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent¹ and Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, operates a restaurant in Louisville, Kentucky, where it annually receives gross revenues in excess of \$500,000. Respondent, at its Louisville restaurant, annually purchases and receives goods valued in excess of \$50,000 from points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an

¹ The Charging Party's motion to strike Respondent's brief is denied. Respondent's brief was received by the Judges' Division of the NLRB on October 6, 1997. It was apparently not served on the other parties until October 23, three days after briefs were due to be filed. Respondent's brief was obviously prepared without the benefit of the other parties' briefs, which were filed on October 18 and 20, respectively.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

5 *Background*

Emmanuel Bucayu worked at the Benihana of Tokyo restaurant in Louisville, Kentucky from 1990 until August 19, 1996, as a teppan chef. At the Benihana restaurants food is cooked at the customer's table on a heated metal grill by the teppan chefs. Part of the attraction of the Benihana chain is the show put on by the chefs for their patrons.

Bucayu was terminated on August 19, 1996, by the restaurant's manager, Ajay Kapur. Bucayu and the General Counsel allege that Respondent violated section 8(a)(1) of the Act in discharging him in retaliation for protected concerted activity. Respondent contends that it terminated Bucayu for non-discriminatory reasons, namely that he did not return from a vacation on time and made no attempt to contact the restaurant for several weeks.

Bucayu's protected concerted activity

Benihana opened its Louisville restaurant in 1978. From about 1989 to the end of 1993, the restaurant was managed by Bernard Noble. Noble was often absent from the restaurant when he was supposed to be there. Employees complained to chief chef Patrick Brua and to Benihana headquarters in Miami, Florida about the manager's absences. At the end of 1993, Noble was demoted, transferred to Chicago and replaced by Ajay Kapur, who previously managed a Benihana restaurant in New York.

Kapur's management style was very different than Noble's. At first employees appreciated the fact that Kapur was available to handle employee complaints. However, his close scrutiny of the way they worked soon made a number of the Louisville employees unhappy.

In April 1995, Bucayu either volunteered or was asked by other employees to draft a letter to the Miami headquarters to complain about Kapur's management style. While a number of these employees have difficulty expressing themselves in English, Bucayu does not. He graduated from college in the Philippines. He also had some courses in computer programming and systems analysis in English, prior to immigrating to the United States. Over a dozen employees gathered to listen to Bucayu read an eleven page letter addressed to Benihana's executive vice-president, Taka Yoshimoto. They signed it after he did. Bucayu mailed the letter to Yoshimoto.

Shortly thereafter, Bucayu called Benihana's Miami headquarters to complain that the management of the Louisville restaurant was retaliating against him due to his letter. His call was returned by Respondent's regional manager in Texas, Frank Kusano.

According to Bucayu, Kusano's tone was hostile. He allegedly told Bucayu that his letter looked as if it had been written by a lawyer. Kusano allegedly accused Bucayu of soliciting employee complaints and suggested he work elsewhere or file a lawsuit if he wasn't happy. Finally, Kusano advised Bucayu to write Yoshimoto another letter if he thought he was the victim of retaliation.

Towards the end of May, 1995, Bucayu wrote such a letter. He alleged that Kapur had retaliated against him by 1) not giving him an 25% employee discount to which he was entitled,

2) telling him not to leave an opened soft drink in a place where other employees are allowed to put such items and 3) sending him home early rather than other chefs on a slow business day. Bucayu also alleged that he had been told by Kusano that complaining in concert was contrary to Benihana policy.² Yoshimoto responded shortly thereafter, essentially denying that Bucayu had been subjected to retaliation. Although Yoshimoto stated that Bucayu had done the right thing to let management know of his views, his letter is somewhat ambiguous with regard to whether the company frowns on concerted complaints by employees.

Bucayu's allegations of recurring retaliation³

In August 1995, Bucayu came to work wearing a wrist band. Kapur initially told him he could not cook with the wrist band unless he provided a physician's note that he needed it for medical reasons. When Bucayu obtained the doctor's note, Kapur said he could only cook in the kitchen, not in front of customers unless he obtained the approval of the Miami headquarters. Bucayu complained that he would receive far less in tips while working in the kitchen. Kapur responded that if he wanted to cook at the customer's tables, he should write to Taka Yoshimoto. Kapur observed that Bucayu was "good at writing letters."

Yoshimoto responded to Bucayu in early September 1995. He asked Bucayu to have his physician make some determinations about Bucayu's wrist, but stated that in the meantime, he could wear the wrist band in the kitchen and dining room so long as it was kept as clean as his chef's coat.

During late 1995 and early 1996, Bucayu contends he engaged in other protected activities and was subjected to additional retaliation. When he asked a busboy to place dirty dishes closer to the dishwashers, Kapur told him he must follow the "chain of command" and communicate with the busboy through the chief chef. He was told the same thing when he complained to Kapur about the cancellation of a visit by an exterminator after employees had spent a lot of time preparing for this event.

Bucayu alleges that he discussed forming some sort of chef's association with other chefs, including the then acting chief chef, Hugo Martinez.⁴ He also warned assistant manager Rene Lancetta that the Shogun restaurants were trying to attract Benihana's chefs by offering them higher wages. Bucayu suggested that Benihana raise the chefs' wages in order to hold onto them.

Regional Manager Frank Kusano visited the Louisville restaurant in May 1996. He had a private discussion with Bucayu. Bucayu alleges that Kusano told him that Kapur was mad at him but that Kusano said he liked the way Bucayu thinks and wanted to make him the assistant chief chef. Two weeks later, a chef with less seniority, Hayato Miller, was appointed assistant chief chef. Bucayu called Kusano, who told him that Kapur objected to the promotion of

² Bucayu used the term "grouping" to express what I believe is concerted employee complaints.

³ The complaint alleges that Respondent violated the Act only in terminating Bucayu in August 1996. All the other complaints of retaliation and discrimination are relevant only in the light they shed on Kapur's motivation in terminating Bucayu (evidence of animus towards his protected activities).

⁴ Patrick Brua, who was the chief chef from 1990 to early 1996, was demoted. Hugo Martinez, a close personal friend of Bucayu, was appointed acting chief chef and then permanent chief chef in the early months of 1996.

Bucayu. Kusano said that Kapur told him that Bucayu missed too many Saturdays. Bucayu says he told Kusano that wasn't true and that Miller had a worse attendance record than he did.

Bucayu's vacation/leave request

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Bucayu became an American citizen in January or February 1996. In July, he was informed that his wife was about to obtain a visa to enter the United States from the Philippines. On July 18, he asked Kapur for three weeks of vacation. Kapur denied his request. He told Bucayu that he was willing to give him a one week vacation starting July 22, and then not schedule him for work again until Saturday, August 3 (effectively 12 days off).⁵

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Kapur told Bucayu he could not give him three weeks of leave because that would leave the restaurant short of teppan chefs.⁶ As of July 18, the restaurant had six chefs, Bucayu, Martinez, Brua, Tommie Shaw, Nester Nieto and Hayato Miller. Nieto was scheduled to transfer to a Chicago Benihana effective July 29. Some weeks earlier, Brua had been scheduled for a week's vacation from August 5 through August 11. Kapur told Bucayu that the departure of Nieto, and Brua's vacation were the reasons he would not grant him three weeks leave. He also told Bucayu that if he could convince Nestor Nieto to delay his departure from Louisville, Kapur might be able to accommodate him. Kapur approached Nieto with this suggestion, which Nieto rejected. Bucayu knew about the planned departure of both chefs before his conversation with Kapur.

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Bucayu protested to Kapur that his vacation request was due to an emergency. He said he had to return to the Philippines to help his wife immigrate to the United States and other personal reasons. Bucayu did not elaborate. At hearing he testified that his trip was an

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⁵ Bucayu alleges that he filled out a vacation request form asking for three weeks vacation starting August 12. He further alleges that after Kapur told him he would not approve such a vacation he filled out a second vacation request form (Exh. General Counsel-10), at Kapur's direction asking for a week's vacation from July 22 to July 28.

Kapur testified that he did not recall any written vacation request other than General Counsel-10, and that he wrote "1" in the box indicating total weeks requested, over the number 3 previously written by Bucayu.

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The significance of whether Bucayu requested a three-week vacation starting on August 12 is that it would indicate that Kapur had almost one month's notice with regard to Bucayu's plans. It would also indicate that Kapur had less of a valid reason to deny the request because Patrick Brua was due back from vacation on August 12.

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I do not credit Bucayu's testimony that he asked Kapur for a vacation starting August 12. It is primarily his unwillingness to contact Kapur after his leave had expired, particularly after he returned to the United States on August 14, that leaves me doubtful as to his credibility.

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As pointed out in Respondent's brief at page 5, Bucayu's claim that he asked for a vacation starting on August 12 appears to be inconsistent with his testimony that he told Hugo Martinez that he had to go to the Philippines as soon as possible to get his wife and his repeated assertions to Kapur that he had an emergency that necessitated his trip. The General Counsel's failure to call Martinez to corroborate Bucayu's claim that he was seeking a vacation beginning on August 12, or that he filled out two vacation request forms, is another factor in my unwillingness to credit Bucayu. Finally, the fact that Bucayu took a three week trip to the Philippines from July 25 to August 14, suggests that this is what he planned to do initially.

⁶ The Louisville Benihana was chronically understaffed. This was in part due to the preferences of the chefs, who received more in tips with understaffing than they would if the restaurant was fully staffed.

emergency because his wife was threatening to divorce him, but he did not tell Kapur that. Bucayu has never satisfactorily explained why the twelve days allowed him by Kapur was inadequate to deal with whatever emergency situation existed in the Philippines, or was inadequate to render whatever assistance his wife needed in immigrating.⁷

After telling Bucayu that he would not approve three weeks leave, Kapur told him he could apply for a leave of absence if he wanted to extend his trip beyond August 3. Kapur indicated to Bucayu very clearly that he was not sanctioning an absence beyond August 3, but that Bucayu might be able to get permission for an extended stay from Benihana's human resources department in Miami.⁸

A few days later Bucayu spoke to Ana Ramos, Benihana's human resources director in Miami. He asked her how much vacation time an employee was entitled to if they had worked for Benihana since 1990. Ramos told him chefs and managers were entitled to three weeks vacation and other employees were entitled to two weeks. She also told him that the restaurant manager had the final say with regard to vacation schedules.⁹ Ramos gave Bucayu no reason to believe that he had authorization to remain absent from the Louisville restaurant beyond August 3.

On July 25, the day he left for the Philippines, Bucayu gave a leave of absence form to kitchen helper Roger Parel. Parel gave the form to Hugo Martinez who mailed it to Ana Ramos in Miami. She received the form on August 5 (General Counsel Exh. 11). On August 9, she

⁷ There was no legal requirement for Bucayu to return to the Philippines in order to help his wife and daughter leave for the United States. Patrick Brua's wife and children immigrated from the Philippines to the United States by themselves after he became a citizen. Bucayu testified that he had friends in the Philippines who could help his wife get her visa faster than if she tried to get it herself. He did not explain why it would take him three weeks to facilitate her immigration.

⁸ Kapur's first language is not English and from his testimony I conclude that what he says in English may not always accurately communicate his intent. However, I am positive that Bucayu understood that Kapur was requiring him to return on August 3, and was not promising him that he could get approval for a longer stay from headquarters. Bucayu's conduct after August 6 is totally inconsistent with a good faith belief that he had been given permission to return later than August 3. On August 6, Martinez informed Bucayu that Kapur was angry that he had not returned. At this point, Bucayu was on notice that he might not have a leave of absence. If he had been led previously to believe that his leave would be approved, one would expect that he would call Kapur or Kusano or Yoshimoto or Ana Ramos, Respondent's human resources director, to either clarify his situation or to get approval for his continued absence.

Additionally, if Kapur had a change of heart, the simplest thing to do was to approve a three week vacation, since Bucayu had three weeks of accumulated vacation time. There would be no reason for Kapur to have Bucayu go through the leave of absence process if he was suggesting a three-week absence was acceptable to him. Finally, there is no credible evidence that anyone else led Bucayu to believe that he was authorized to return later than August 3.

⁹ Bucayu asserts he asked Ramos how long he was allowed for a leave of absence and that she told him 30 days. He then says she advised him to fill out an application for a leave of absence and to send it to her. Ramos denies that her July conversation with Bucayu involved anything other than entitlement to vacations. I credit Ramos. In addition to my general reservations about Bucayu's credibility, I would note that on his application for unemployment insurance he stated that Ramos told him he was entitled to three weeks vacation and said nothing about discussing a leave of absence with her.

sent the request back to Kapur. As a general rule, Ramos does not approve a request for a leave of absence without the approval of the restaurant manager. However, on occasion, the human resources department overrules the manager if the requesting employee makes out a compelling case for the leave. Ramos found nothing in Bucayu's request justifying approval without the consent of Kapur.

When Bucayu failed to show up for work on August 3, Kapur asked chief chef Martinez if he had any information about when he would return to work. Martinez apparently had Roger Parel's wife call Bucayu in the Philippines to tell him to call Martinez. Bucayu called Martinez on approximately August 6.¹⁰ Martinez told Bucayu that Kapur was angry that he did not return on August 3 and that Bucayu should call Kapur (R Exh. 7, Tr. 286-87). Bucayu did not make such a telephone call.¹¹

Bucayu returned to Louisville on August 14. He did not report to work and made no attempt to contact the management of the restaurant until August 22. He did, however, get together socially with some of his co-workers on August 16.¹² On August 22, he called Hugo Martinez and asked Martinez to schedule him for work on August 26. Martinez said Bucayu would have to talk to Kapur. Once again, Bucayu failed to make such a call, nor did he attempt to contact Yoshimoto or Kusano, as he had in the past.

A few days later Assistant Manager Rene Lancetta called Bucayu and left a message on his answering machine. Bucayu waited a few days and returned the call on August 26. Lancetta accurately advised him he'd been terminated on August 19. Bucayu made no attempt to contact Kapur, who didn't see him again until an unemployment insurance hearing on October 22 (CP Exh. 1). Lancetta apparently did not inform Kapur that he talked to Bucayu until October 22.

After being told by Lancetta that he'd been terminated, Bucayu called Ramos a second time. He told her he didn't understand why he'd been terminated since he had a leave of absence. Ramos researched his application and then informed Bucayu that the leave request had not been approved and that he would have to talk to his manager.

Kapur made no attempt to borrow chefs from other Benihana restaurants during

¹⁰ The Philippines is on the other side of the International dateline and is often one day ahead of the United States. Thus, if Bucayu called Martinez on August 6 in the Philippines, it may have been August 5 in the U. S.

¹¹ I do not credit Bucayu's testimony indicating that Martinez gave him reason to believe he would not have to return to work until August 26 (Tr. 89-90). Bucayu testified that Martinez told him he'd talk to Ana Ramos and that Benihana would probably provide a chef from another restaurant in the interim. Again, I am loathe to credit Bucayu's testimony on this point in the absence of corroboration from Martinez. Secondly, I doubt that Martinez would give such assurances without first talking to Kapur. As Kapur explained, it is not easy to obtain a chef from another Benihana. The "borrowed" chef has to be willing to come to Louisville and Kapur would have to pay for his travel and lodging out of his budget.

¹² Bucayu testified that on August 16, Roger Parel, Patrick Brua and Rudolpho Tolentino informed him that Assistant Manager Lancetta had told them that Bucayu had been terminated. I can't credit Bucayu's testimony on this issue either. It is inconsistent with his waiting until August 22 to call Martinez and his request that Martinez schedule him for work on that date. One would expect that Bucayu would immediately call Martinez or another management official to determine whether he still had a job.

Bucayu's absence. In September, after Patrick Brua quit and Hayato Miller was injured, he had only two chefs in Louisville who were capable of working. Kapur then borrowed chefs from restaurants in Houston and Memphis until Miller was able to return to work.

5 *Other employees who overstayed their vacations or leave of absences and were not disciplined*

The General Counsel introduced evidence regarding other employees at the Louisville Benihana restaurant who overstayed their vacation or leave and were not discharged or disciplined. Armond Lasin, a bus boy, requested a 2-week vacation in about September 1996 to accompany his mother to the Philippines. Kapur denied the request because Lasin did not have any accrued vacation time.¹³ However, he did allow Lasin a 2-week leave of absence. During his leave, Lasin's sister called Kapur and told him that Lasin needed another two weeks of leave because his mother had lost her passport. Lasin returned to work after a 4-week absence and was not disciplined.

15 In May 1995, Roger Parel, a kitchen helper,¹⁴ applied for an emergency leave of absence when his father died in the Philippines. Kapur asked Parel how long he would be gone and Parel told him he did not know. Parel was granted a 1-week leave but was absent from work for four weeks. During this period Kapur was advised by chief chef Patrick Brua that Parel would extend his stay in the Philippines to wrap up his father's affairs. Upon Parel's return to the United States, he immediately went to the restaurant and said he could return to work 2 days later. He returned to work without receiving any discipline.

25 Rudolpho Tolentino, a chef, applied for and was apparently granted a leave of absence for the period October 26 through November 11, 1996. He did not return to work as scheduled and Kapur terminated his employment on December 6. In January 1997, Tolentino came to the restaurant and asked Kapur for his job back. He apologized for not returning on time and assured Kapur that he couldn't afford to go to the Philippines again. Kapur gave Tolentino his job back as a new hire. Tolentino lost his seniority from his prior period of employment.

30 *Analysis*

In a case alleging discriminatory discharge in retaliation for protected concerted activity, the General Counsel presents a prima facie case by showing that an employee has engaged in protected concerted activity-that is, the individual acts with or on the authority of other employees, the employer knew of the concerted nature of the activity, and the discharge was motivated by the employee's protected concerted activity, *Amelio's*, 301 NLRB 182 (1991). If a prima facie case is established, the burden of persuasion shift to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in the protected concerted activity, *Wright Line*, 251 NLRB 1083, enf. 662 F.2d 899 (1st Cir. 1981).

¹³ Respondents' "leave of absence" appears to be intended for employees who have insufficient accumulated vacation time to cover the period they must be absent from work.

45 ¹⁴ Parel was at some time during his employment a chef trainee. It is not clear whether or not he was a chef trainee in May, 1995. Exhibit R-11 indicates that on May 1, Parel requested a 1-week leave starting May 22 and that it was approved by Kapur and Ramos well in advance of May 22. Respondent, however, concedes that Parel stayed in the Philippines well beyond the expiration of his leave of absence (Tr. 440). Kapur testified that he had been told, possibly by Brua, that Parel would return later than originally planned and that as a kitchen helper Parel's prompt return was not as critical to operation of the restaurant as was Bucayu's.

The motivation of the employer can be established by circumstantial evidence rather than direct evidence, *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995). Often a factor in determining motivation is the animus of the employer to the protected activity, which can also be drawn from circumstantial evidence, *Washington Nursing Home, Inc.*, 321 NLRB 366 (1996). In the instant case, Respondent concedes that Bucayu engaged in protected concerted activity and that it was aware of the activity and its concerted nature.

With regard to proving animus, the General Counsel has not established that Bucayu was the victim of retaliation with regard to the wrist band, the promotion of Miller to assistant chief chef or other incidents about which he testified. I would note that Bucayu's account of his May 1996 conversation with Kusano indicates that Kusano did not harbor any animus towards him due to the 1995 letters to Yoshimoto.

Further, I conclude that it has not been established that Respondent bore animus towards Bucayu as a result of his discussions regarding "an association of chefs." It is not clear precisely what Bucayu had in mind and in any event there is no evidence that Kapur was aware of these discussions. The management personnel with whom Bucayu discussed the association, Martinez, Brua and Miller, assumedly would benefit from it. Similarly, there is no reason to believe that Respondent would retaliate against Bucayu for warning Lancetta that Shogun was trying to attract chefs away from Benihana and that the chefs' wages should be raised to encourage them to stay with Respondent.

On the other hand, I do not believe Kapur's testimony that he did not harbor any ill feeling towards Bucayu on account of Bucayu's letters to Yoshimoto. I infer that in August 1996, Kapur was still hurt and angry about Bucayu's 1995 letters. Nevertheless, Kapur's animus is an insufficient basis on which to draw the inference that Bucayu's termination was motivated by Kapur's desire to retaliate, in view of Bucayu's failure to return to work on August 3, or to contact Kapur or any other restaurant manager until August 22.

The timing of Bucayu's termination does not suggest retaliatory motivation. Further, the General Counsel has not established disparate treatment of Bucayu from which one can draw such an inference. I credit Kapur's testimony that unauthorized absences of kitchen helpers was of far less concern than the unauthorized absence of chef. Moreover, none of the instances relied upon by the General Counsel are otherwise comparable to Bucayu's situation. None of the other individuals had been specifically told, for what appears to be legitimate reasons, that they could not be absent from the restaurant beyond the period of leave requested. Moreover, Lasin timely requested an extension of his leave and gave what appears to be a good reason for not returning as originally planned. Parel apparently also advised Kapur through Brua as to the reasons he would not be back at the expiration of his leave. Tolentino, the chef who overstayed his leave, was terminated.

Further, I conclude that the General Counsel has not established that Respondent's proffered reasons for Bucayu's termination were pretextual. The General Counsel suggests, for example, that Kapur's failure to seek a replacement for Bucayu indicates that he was not terribly inconvenienced by his absence. Kapur credibly testified to the difficulties of borrowing chefs from other Benihana restaurants. I can draw no conclusions from his failure to do so particularly when he was expecting Brua to return to work on August 12 and had no idea when Bucayu would return. In this regard I would note that Kapur did not terminate Bucayu until after his absence exceeded the three weeks that Bucayu had requested. I also find that no inferences can be drawn from the fact Kapur borrowed chefs in September after Brua had quit and Hayato Miller had been injured.

Finally, I conclude that assuming that the General Counsel establish a prima facie case, Respondent met its burden that Bucayu would have been terminated even in the absence of his protected activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 10, 1997.

Arthur J. Amchan
Administrative Law Judge

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.